THE DOCTRINE OF JUDICIAL SUPREMACY.

SPEECH

OF

DUPLICATE EXCHANGED.

CHARLES C. BONNEY,

BEFORE THE

AMERICAN BAR ASSOCIATION,

AT SARATOGA, NEW YORK.

August 23, 1883.

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The paper read by Robert G. Street, of Texas, on "How Far Questions of Public Policy may Enter into Judicial Decisions," being under discussion,

CHARLES C. BONNEY, of Illinois, spoke as follows:

Believing, as I do, that the doctrine of Judicial Supremacy is the rock on which constitutional government rests, a sense of duty constrains me to protest against any attempt, in a body of which I am a member, to impair that foundation-stone of the superb superstructure that rests upon it. Let me therefore devote the few moments allowed by the rules of the Association, to an examination of the nature and extent of the judicial power, and of what I conceive to be the fundamental error of the learned essayist's position. It is one of the charms of our profession that we are trained to distinguish between men and principles, and with only the kindliest feelings towards the man, wage the most vigorous opposition to the measure he supports. I, therefore, with great pleasure, pay the tribute of my admiration for the learning and ability displayed in the paper under consideration, while I dissent *in toto* from the conclusions reached.

I think we will all agree that the application of the law to a state of facts, for the determination of a controversy, is a pure judicial function: and that it is indispensable to the proper exercise of that function, that the court shall examine

the law, and also the contract, if the proceeding rest upon an agreement, in order to ascertain and declare their meaning. Hence the construction and interpretation of laws and documents, and the definition of their terms and meaning, is strictly and wholly within the judicial province, and inheres in the very nature of the judicial power. Let us now take another step. All the judicial powers are granted to, and wholly vested in the one Supreme Court, and such courts inferior thereto as the Congress may establish. No such powers are reserved, no exception is made; hence we must conclude that no power of final construction, interpretation, and definition has been given to the executive and legislative departments. That power, so wholly conferred upon the judiciary, must be exercised by them for all departments and agencies of the government. Executive and political officers may, in the first instance—and, indeed, must—form opinions of their powers and duties in relation to the matters upon which they are called to act; but they have no jurisdiction and authority finally to determine the extent and limits of their powers under the Constitution. The supreme and final authority so to decide is vested in the courts, and, when exercised, binds all the agencies of the government. The President and Congress are bound by their official oaths to support and uphold the Constitution of the United States. What that Constitution requires can be conclusively determined only by the judicial tribunals. If this were not the law, we should have the strange spectacle of the purse and the sword determining for themselves the extent of their obligations and their powers. What patriotic executive or legislator would wish it so? Who would not rather desire to have some disinterested and impartial arbiter discharge that solemn responsibility?

The theory of co-ordinate departments of government is well enough in its proper place; but it gives no just warrant

for the claim that any department can properly exercise any power committed to another—which is the precise point under discussion—the exposition of the Constitution and of statutes enacted under it being judicial in its very nature, and granted, with all other judicial powers, to the courts by the express terms of the Constitution.

But, for greater certainty, let us inquire what is the nature of legislative authority. It did not create human society, nor did it make the fundamental rules of jurisprudence. Both existed before the legislative department of government was organized. Few of the rules that regulate human conduct were framed by the legislative hands. The great body of them were evolved from the experience of mankind, in the progress and development of civilization. Some have been added, and many modified by legislative enactment.

The exercise of pure political power is the chief duty of legislative bodies. This includes municipal corporations, elections, revenues, and appropriations. But they have also the power to establish new rules for future cases. They have not the authority to declare what the law *is*. That is a judicial function. We are apt to forget how small a part of the whole body of existing law we owe to legislation. Let a single illustration suffice. I heard a learned judge say of his court, that if the legislature should repeal every statute regulating its proceedings, he could nevertheless go on, under the constitutional grant of jurisdiction and the practice of the common law, and administer complete justice in all cases within the grant of the Constitution.

Deriving our jurisprudence largely from the mother country, we sometimes overlook differences which are fundamental. The doctrine of parliamentary omnipotence is radically different from the American principle of separate and distinct departments of power. The British Parliament may, it is

claimed, change the succession of the crown, and by its House of Lords it exercises the judicial authority of last resort. But under the American system, the legislative, executive, and judicial departments of power are separated by fixed and permanent barriers, that cannot be passed without usurpation. The American Constitution is a new thing in practical government. Its unity and integrity are maintained by the judicial supremacy it creates, and cannot otherwise be perpetuated.

We are apt to overlook the inherent powers of the judiciary, and to forget that "the court of equity is a fountain of remedies:" and that while it has no authority to create new rights, it has jurisdiction to recognize and enforce all that are regarded as such, and, in language ancient and eloquent, "will not suffer a right to be without a remedy."

The fundamental principle of our government is that the people, by their constituted agencies, may make what constitutions and laws they will; but that, having made them, the people must obey them while they stand. *Thus the law is sovereign.* No majority may rightfully disregard it. A child may invoke its protection against a multitude. The liberty of constitutional government is not the liberty to obey or disobey the laws according to personal or official pleasure or opinion; but it is the freedom to participate in making them; to act within the established limits; to change them in legitimate ways; and to enjoy the exercise of thought and conscience, unrestrained by human authority.

Two radically different views of the judicial department of the government are presented. One regards the courts as created to settle controversies between individuals, and as practically excluded from participation in public affairs; the other deems the establishment of a supreme judicial authority, exalted above the control of political agencies, as the crowning excellence of our system, without which it could

not long endure, but with which it may contemplate the coming centuries without fear.

It is rather to the natural growth and development of jurisprudence, than to the legislative authority, that we should look for the new rules that new emergencies may require. The doctrine of judicial evolution is fundamental to the common law, as well as firmly established by modern decision. It is one of the boasted excellencies of the common law, that it adapts itself by needful changes and enlargements to new conditions as they arise; and I do not hesitate to declare that it is the fault of the courts, if needless technicalities are retained after the reason for which they were invented has ceased to exist. The doctrine of judicial evolution is clearly recognized by the Supreme Court of the United States, in holding that the power "to regulate commerce" extends to the telegraph and other agencies not dreamed of when the Constitution was formed. The learned essayist referred to Jefferson's dogma that words are to be understood in the sense they bore when they were used. But thus stated, this rule is a heresy, as well as a dogma, for it states but half a truth. The Constitution was made, not for the present, but for all the future, whether near or remote. If the illustrious men who formed it had been asked the question, they would have declared with one voice that they were building for a great posterity, and that the words they used were intended to expand with the growth and development of the country, and to meet new conditions and emergencies as they might occur. This is judicial evolution. Amendments to the Constitution, and new statutes have, indeed, been required, to repeal provisions no longer needed, and to confer new rights and privileges. Such improvements are within the legislative domain; for, as I have already said, the courts have no power to confer new rights and privileges. Their authority is limited to the protection and enforcement of such as exist.

We have listened to severe censures of judge-made law and judicial legislation. What is the meaning of these terms? Judge-made law consists of judicial expositions of the various doctrines of jurisprudence as found in, and illustrated by adjudged cases. Of this there is fortunately very much. Judicial legislation consists of arbitrary rules, not existing in the nature of the relations involved, but asserted and applied by the court without warrant of principle or of law. Of this there is fortunately very little. Of judge-made law, the text-books on commercial law, the law of contracts, the law of common carriers, the law of evidence, and, without enumerating other branches, the jurisprudence, pleadings, and practice of equity, largely consist. We owe little in all these departments to legislative enactment. They are the result of the evolution and development of the law under judicial exposition. This is even more true of constitutional law. The human intellect has never reared a nobler edifice than the American system of constitutional jurisprudence. It has risen under the hands of its master-builders, with a harmony, strength, and beauty as fascinating to the lawyer and the judge as is the matchless Cathedral of Milan to the eye of an architect or a poet. But other subjects press for time and hearing, and I must close. If I have spoken earnestly, it is because my words have come from my heart, and because I believe that the question to which I speak is vital to the best interests of this country. I close with a repetition of the noble tribute of the President's Address to that greatest expounder of the Constitution, John Marshall. We cannot match his judicial expositions of the great powers of government, by any chapter of legislative achievement. The only legislative act worthy to stand in "fame's proud temple" side by side with those expositions, is the famous ordinance of 1789. Distinguished by a far-reaching and almost superhuman sagacity, that act of legislation deserves

to rank with the Declaration of Independence and the national Constitution.

For the reasons thus briefly given, I must dissent from the argument of our learned brother, that the legislative and executive departments of the government have the right to determine for themselves the extent of their powers and duties under the Constitution, and must hold that those departments are, and of right ought to be, bound and concluded by the judgments of the judiciary on all questions of constitutional authority.

Let us encourage, rather than retard, the work of judicial evolution. Let us acknowledge and honor, rather than decry and seek to remove, that golden crown of constitutional government, JUDICIAL SUPREMACY.

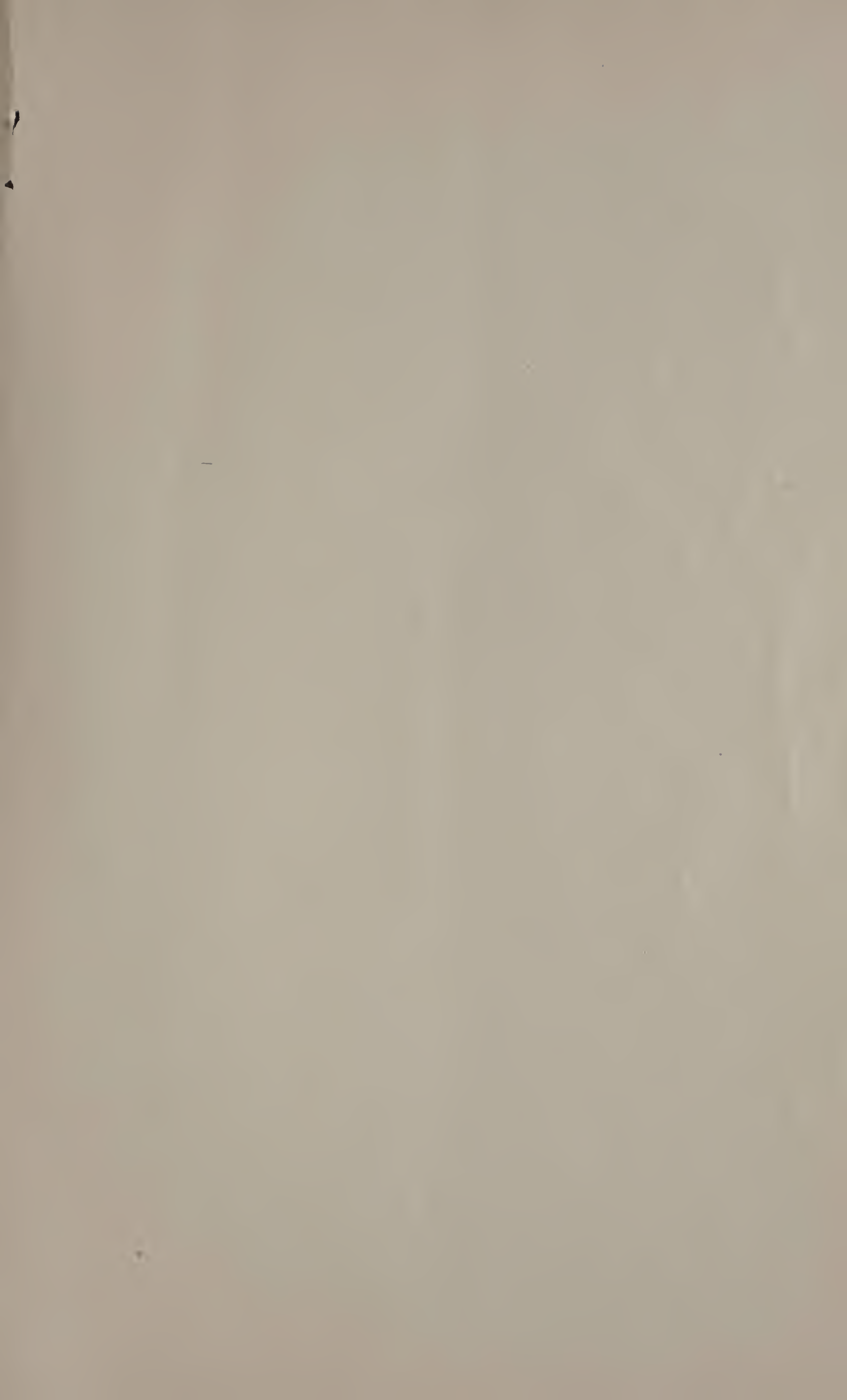
NOTE.—A striking illustration of the practical operation of Judicial Evolution is afforded by the development of the police power of the state against the doctrine of the Dartmouth College case. The contract rights of corporations still remain inviolable, but they are required to hold and exercise them in subordination to the public welfare and safety.

That judicial supremacy is an established *fact* may be shown by a long line of decisions of the Supreme Court of the nation and of the highest tribunals of the several states. From almost the beginning of our system of constitutional government by distinct departments of power, questions of the existence of limitation of legislative or executive authority have been submitted to the judiciary for final determination, and have been accordingly decided, with the general acquiescence of all the departments of the government, and with the concurrence of the bar and the people. Attempts have, indeed, been made from time to time to establish an exception in favor of the executive and legis-

ture, to decide for themselves the existence and extent of their powers and duties under the Constitution, but those attempts have not been successful.

Judicial supremacy also clearly extends to the final determination of the powers and rights and duties of the general government and the governments of the several states in relation to each other.

C. C. B.



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